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In The

Supreme Court of the United States

October Term, 1983

EXPEDIENT SERVICES, INCORPORATED and JOHN CURRY, RALPH RHINELANDER, and RICHARD FRAZIER on behalf of themselves and all others similarly situated,

Petitioners,

vs.

JAMES M. BEGGS, Administrator of the National Aeronautics and Space Administration, and RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in finding that injuries of a constitutional magnitude suffered equally by all members of a certified class subsequently become moot because some members of the class attempt to mitigate continuing financial injuries?

2. Whether the court of appeals erred in finding that continuing economic injuries being suffered by members of a certified class, are insufficient to avoid allegations of mootness?

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No.

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JAMES M. BEGGS, Administrator of the National Aeronautics and Space Administration, and RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioners, Expedient Services, Incorporated (ESI), John Curry, Ralph Rhinelander and Richard Frazier as representatives of a class of employees consisting of former ESI employees, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on May 17, 1984. A petition for rehearing was denied on June 18, 1984.

OPINIONS BELOW

The opinion and order of the United States District Court for the Middle District of Florida is unreported and is reproduced at Appendix A. The order of the United States Court of Appeals for the Eleventh Circuit remanding the case for further proceedings, reported at 721 F. 2d 1323 (11th Cir. 1983), is reproduced at Appendix B. The order on limited remand of the district court is unreported and is reproduced at Appendix C. The per curiam order of the United States Court of Appeals is unreported and is reproduced at Appendix D. The order denying rehearing and rehearing en banc is reproduced at Appendix E.

JURISDICTION

The judgment of the United States Court of Appeals was entered on May 17, 1984, and a petition for rehearing was denied on June 18, 1984. This petition is filed within the time granted to petitioners by Justice Powell on September 8, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1). Jurisdiction in the district court was invoked pursuant to 5 U.S.C. §701 *et seq.* and 28 U.S.C. §§1331, 1346(a)(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution, relevant portions of the National Labor Relations Act, 29 U.S.C. §§151-169, and the Service Contract Act, 41 U.S.C. §351 *et seq.* are each involved in this case. 29 U.S.C. §157, reads as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted

> activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

The relevant portions of the Service Contract Act, 41 U.S.C. §353(c), reads as follows:

> No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and benefits, and any prospective increases in wages and fringe benefits provided for in a collective bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: Provided, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.

STATEMENT OF THE CASE

This case involves the constitutionality of certain sections of the Service Contract Act, 41 U.S.C. §351 *et seq.* The class action petitioners challenged the Act, as amended, as being

unconstitutional on its face and as applied because it infringed on their First Amendment freedom to associate as non-union employees and because it denied non-union employees equal protection of the law. Because of the opportunity for repetition of the injury reflected by the underlying facts in the case, the Court must review this case to rectify the very alarming precedent established by the decisions below.

A. Procedural Background

The district court held that the class action employees had standing to attack the constitutionality of the Service Contract Act (SCA or "Act"). The court determined that "the SCA had already affected them by treating them, again arguably, differently than union employees in denial of equal protection guarantees." (10a). The district court also found that the Act "may encourage plaintiff employees to unionize . . ." (15a) to avoid the economic hardships of non-union status. Nevertheless, the district court dismissed the employees claim and entered judgment for the defendants.

On appeal to the Eleventh Circuit, subsequent to oral argument, the parties were unable to agree on the factual occurrences since the entry of the district court's opinion and thus the court of appeals remanded the case to the district court solely "to allow the making of additional findings surrounding the issue of mootness." (19a). The issues raised on appeal by petitioner ESI were not addressed at that time.

In the district court's order on limited remand, it acknowledges the respondent Department of Labor's *post-judgment* admission that "the employees did not receive as much as they would have been entitled to receive if Section 4(c) were applicable." (21a). The district court determined that despite the continuing nature of the economic injuries, these injuries were

insufficient to overcome the claims of mootness raised by the defendants (21a).

The district court reasoned that because some of the employees elected to join a union (after the original memorandum opinion had issued acknowledging that this would happen), the certified class no longer had standing to pursue their claims (21a-22a). Moreover, the court reasoned that because of this "voluntary action" by some members of the certified class, the claims of all class members have become moot (22a).

The Eleventh Circuit, "based upon the record on remand" (23a) which dealt *exclusively* with the "factual occurrences since the entry of the (original) judgment in the district court," dismissed the appeal as moot. Petitioner ESI's arguments raised on appeal were still not addressed.

Subsequently, the Eleventh Circuit, without written opinion, elected not to rehear the case and rejected petitioners' suggestion for a rehearing en banc. Petitioner ESI's appellate issues went unaddressed.

This case presents for review the following propositions: whether First Amendment claims of a certified class become moot because certain members of that certified class voluntarily elect to avoid continued financial injuries and succumb to economic pressures by, joining a labor union; that those members of the certified class that elected not to join a labor union have no further right to pursue their constitutional rights because of the actions of other members of the certified class; and that continuing constitutional and economic injuries of an entire certified class become moot because of the forced waiver of their rights by some members of the certified class (35a).

B. Operation of the Service Contract Act

The Service Contract Act, 41 U.S.C. §351 *et seq.*, was enacted in 1965 for the purpose of "provid[ing] labor standards for the protection of employees of contractors and subcontractors furnishing services to or performing maintenance for Federal agencies."[1] The Act requires the Department of Labor (DOL) to determine the prevailing wage rates for various jobs in an applicable locality. The DOL then uses these wage rates in official wage determinations, which set a minimum below which government contractors are precluded from paying employees.

In 1972, Congress amended the Act. In particular, the amended Act provided that wage determinations issued by DOL be based upon the wage rates and fringe benefits set forth in an existing collective bargaining agreement.[2] If no collective bargaining agreement exists, the amended Act directs that wage determinations be issued on the basis of the prevailing wage rates and fringe benefits in the locality.

The Amendment provides the same requirement in regard to fringe benefits. 41 U.S.C. §351(a)(1) and (2). In addition, the Act was amended to require that a successor contractor pay its employees the same wages and fringe benefits paid by the predecessor contractor, if the predecessor's wage rates and fringe benefits were set forth in a collective bargaining agreement. Where

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1. S. Rep. No. 798, 89th Cong., 1st Sess. (1965), *reprinted in* [1965] U.S. Code Cong. and Ad. News 3737. The Service Contract Act was the third in a series of federal statutes setting forth labor standards for government contractors. Congress previously had passed the Davis-Bacon Act, 40 U.S.C. §276(a), *et seq.* and the Walsh-Healey Public Contracts Act, 41 U.S.C. §35, *et seq.*

2. Also included is the requirement that prospective wage increases provided in the agreement be included in the DOL wage determination. 41 U.S.C. §351(a)(1)(B).

the predecessor has no collective bargaining agreement, wage rates are to be based upon the prevailing wage rates in the locality as determined by the DOL.

Petitioners alleged in their complaint, *inter alia*, that §§2(a)(1) and (2) and §4(c) of the Service Contract Act, as amended, 41 U.S.C. §351 *et seq.* are unconstitutional on their face and in operation because those provisions discriminate against service contractors and their employees who are not unionized and subject to a collective bargaining agreement.

C. Performance of the Roads and Grounds Service Contract at Kennedy Space Center by ESI and ESI Employees

Expedient Services, Inc. (ESI) is a private, non-union employer which at all relevant times held the roads and grounds service contract at Kennedy Space Center (KSC), Brevard County, Florida. Petitioners John Curry, Ralph Rhinelander and Richard Frazier were employees of ESI and are certified representatives of the class consisting of all non-supervisory, hourly-paid ESI employees.

In July 1977, ESI was awarded the roads and grounds contract at KSC for one year with two one-year options. The predecessor contractor, was unionized and a collective bargaining agreement was in effect. Consequently, §4(c) of the SCA required ESI to pay its employees, at a minimum, the same wages and fringe benefits paid by the predecessor contractor under the collective bargaining agreement. In September 1977, an election was conducted by the National Labor Relations Board to determine if the current ESI employees desired continued representation by the International Association of Machinists. In that election, the employees overwhelmingly rejected unionization.

Following the first year of ESI's contrct with NASA, the Company and the employees negotiated and agreed to various

wage rates and fringe benefits which ESI then used in its negotiations with NASA for reimbursement. After NASA approved these new wage rates and fringe benefits, a new wage determination, WD 78-817 issued. The new rates were much lower than those agreed to by ESI and NASA. ESI brought these substantial differences in wages and fringe benefits (almost $3.00 per hour) and job classifications to the attention of the NASA Contracting Officer. The NASA officials informed ESI that the DOL Wage Determination could be disregarded and, on that basis, the Company did not protest WD 78-817. Thereafter, for each option year and extension of the contract, ESI repeated its pattern of negotiations with its employees, then using the resulting wages and fringe benefits figures in its negotiations with NASA for reimbursement. NASA continued to compensate at rates higher than those contained in the wage determinations issued.

On May 30, 1980, DOL issued a new WD 78-817 (Rev.-2). That wage determination again contained wage rates and job classifications different than those agreed to by NASA and ESI. The wage rates set forth in WD 78-817 (Rev.-2) were based upon DOL's view of the prevailing rates for similar employees in the Brevard County locality.

Near the end of the third year of the contract, NASA announced its intention to re-let the roads and grounds service contract through a competitive procurement process using Rev.-2. ESI thereafter filed a protest with DOL regarding WD 78-817 (Rev.-2) because of the difference between the job classifications, wage rates, and fringe benefits negotiated by NASA and ESI and those set forth in the revised Wage Determination. ESI contended that if WD 78-817 (REV.-2) was used in the procurement process, it would place ESI at a competitive disadvantage. Moreover, WD 78-817 (Rev.-2) contained job classifications which did not correspond with those used by ESI, and agreed to by NASA. As a result, competitors could simply ignore ESI's existing

classifications and wage rates thereby changing the job classifications and the corresponding wages and fringe benefits paid to ESI employees.[3]

ESI then protested the issuance of WD 78-817 (Rev.-2), contending that the Wage Determination should reflect wages equivalent to those negotiated by ESI and NASA. DOL accepted ESI's protest and issued WD 78-817 (Rev.-3), which closely followed the wage rates paid by ESI to its employees and properly listed the existing job classifications for ESI employees. NASA, however, issued letters to all prospective bidders advising them that NASA did not consider the new Wage Determination to be applicable to the procurement. When it appeared that NASA would enter into a contract for roads and grounds services on the basis of WD 78-817 (Rev.-2), ESI and its employees filed their lawsuit.

During the period July 1977 through October 1982, ESI paid wages and fringe benefits at rates above those which were required in the applicable wage determination for the roads and grounds function [WD 78-817 (Rev.-5)] (Trial Exhibit No. 4).

In November and December 1982, wage rates and fringe benefits paid by ESI to the employees decreased as a result of ESI's continued inability to obtain approval of wage increases from NASA. ESI completed its contract for performance of the roads and grounds function with NASA on December 31, 1982. *See* 27a (Joint Stipulation ¶1).

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3. Mr. Raymond Kamrath, DOL Director of Division of Wage Determination, admitted that where a wage determination is issued with wage rates lower than those paid by the incumbent contractor, the incumbent is put at a competitive disadvantage. Trial transcript at 376-77.

On January 1, 1983, ESI began performing a six-month fixed price subcontract with the new basewide contractor EG&G Florida, Inc. (EG&G) for the roads and grounds function, and those class action employees hired by EG&G were paid in accordance with the wages established by ESI for the period January to June 1983. NASA required EG&G to provide details regarding wages and fringe benefits paid by ESI under the subcontract. *See* 35a-36a. EG&G in turn required ESI to provide documentation of those wages and fringe benefits and this documentation was submitted to NASA. NASA then consented to the total subcontract (28a, Joint Stipulation, ¶13).

ESI's subcontract with EG&G expired June 30, 1983 and on July 1, 1983, EG&G began performing the roads and grounds functions in-house after hiring *most* of the class action petitioners (27a, Joint Stipulation, ¶4). The wages EG&G paid its employees were in each labor grade lower than wages paid by ESI to employees in identical labor grades. EG&G's per hour cost for group insurance and pension benefits for all employees was $1.71, down from ESI's previous level of $2.20 per hour.

Thereafter, a majority of the *new* roads and grounds crew, including those class action petitioners who had been hired by EG&G, elected to be represented by a labor organization. In October 1983, EG&G and the International Association of Machinists (the same union which had previously been denied certification by the class action petitioners when they were employed by ESI) entered into an agreement whereby EG&G continued paying the same (lower) wage rates as it had since July 1983 for certain former ESI employees.

Additionally, as confessed by the Department of Labor, the class action petitioners lost valuable fringe benefits. *See* 28a (Joint Stipulation, ¶¶9-12). ESI's payment of $2.20 per hour provided the employees with group health and dental insurance that covered

their dependents (28a, Joint Stipulation, ¶12) and still left $.80 per hour to be paid on a weekly basis to employees as a cash fringe equivalent for use as they wished. EG&G, however, pays $1.71 per hour for pension and group health insurance, but does not include insurance covering dependents of the class action petitioners.[4]

REASONS FOR GRANTING THE WRIT

I.

ALL EMPLOYEE PETITIONERS' CLAIMS CANNOT BE MOOTED BY ACTIONS OF A PORTION OF THE CLASS.

The outstanding injuries complained of by the class action employees, specifically infringement on First Amendment constitutional guarantees and economic injuries, have erroneously been held to have somehow become moot without being abated. These errors of fact and law, committed by both the district court and the court of appeals, are doubtlessly due to the difficulty and complexity of the doctrine of mootness.[5]

The district court had decided after trial that non-union employees were not receiving equal protection of the law and the court noted its suspicion that, because of the adverse impacts of the Service Contract Act upon non-union employees, non-union

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4. To retain dependent coverage, the class action members employed by EG&G are required to pay $38.23 per month extra for health insurance and $10.14 per month extra for dental insurance, thus resulting in an additional out-of-pocket loss of $48.48 (28a, Joint Stipulation, ¶¶11 and 12). The total monthly loss in wages, plus amounts expended on dependent insurance coverage, is thus $214.88.

5. *See e.g.*, Stewart, J. dissenting in *Super Tire Engineering Company v. McCorkle*, 416 U.S. 115, 133 (1974).

employees, such as the class action employees herein, would subsequently elect to be represented by a labor organization.

The district court proved prophetic in that due to the protracted nature of these proceedings and the employees inability to obtain protection for their non-union wages and fringe benefits, some of the non-union class action employees subsequently chose a collective bargaining representative. Based upon this selection, despite acknowledgement by the DOL and the district court in its order on limited remand of the actual adverse economic impacts of the Act upon non-union status, the district court held that *all* class action employee claims, constitutional and economic, were moot.

The Eleventh Circuit adopted this decision. At no time did the appeals court make any independent findings of fact or law.[6]

As the claims of both the class action employees and petitioner ESI are still live and concrete, their claims by definition, law, and common sense are not moot.

Mootness of a lawsuit occurs when the controversy between the parties is no longer "definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-41 (1937).

"The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review and not simply at the date the action is initiated." *Roe v. Wade*, 410 U.S. 113,

6. As company petitioner ESI argued in its request for rehearing and suggestion for rehearing en banc, and as it argues herein, the Eleventh Circuit has not yet addressed the arguments which ESI raised on appeal. The order on limited remand did not address ESI's appellate claims because ESI's arguments were not subject to the earlier Eleventh Circuit remand. Thus, ESI's arguments and claims are still live.

125 (1973). Under Article III of the United States Constitution, for federal court jurisdiction to remain, there must be a live or actual case or controversy. *Iron Arrow Honor Society v. Heckler*, ____ U.S. ____, 104 S. Ct. 373, 374 (1983); *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974). To satisfy the requirements of Article III jurisdiction, "a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision." *Iron Arrow*, 104 S. Ct. at 374; *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976).

Therefore, "a case is not moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 497 (1969). These class action employees demonstrated at each level that the amendments to the SCA had already adversely affected them because of their non-union status, and no factual or legal developments during the history of this action have changed or remedied this impact.

As this Court has previously ruled:

> jurisdiction properly acquired may abate if the case becomes moot because:
>
> (1) it can be said with assurance that "there is no reasonable expectation . . . that the alleged violation will recur" . . . and
>
> (2) interim relief or events have *completely* and *irrevocably* eradicated the effects of the alleged violation. . . .
>
> Only when *both* conditions have been satisfied can it be said that the case is moot because the parties no longer have a cognizable interest in the outcome of the litigation.

County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (emphasis added).

If the parties retain any interest whatsoever, such as where several issues are raised and all but one becomes moot, the court must continue the case through to final resolution, as a case or controversy still exists. *Powell v. McCormack*, 395 U.S. 486, 497 (1969).

"As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot notwithstanding the size of the dispute." *Firefighters Local Union No. 1784 v. Stotts*, ___ U.S. ___, 104 S. Ct. 2576, 2584 (1984); *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, ___ U.S. ___, 104 S. Ct. 1883, 1889 (1984) (the amount in controversy is "undeniably minute."); *Powell v. McCormack*, 395 U.S. at 496-98 (there need be only some effective relief which the court can award to defeat claims of mootness). *United States v. Geophysical Corp. of Alaska*, 732 F. 2d 693, 698 (9th Cir. 1984). This case is therefore by definition, not moot.

A claim is moot if "past exposure to illegal conduct" is not accompanied by a "continuing, present injury or real and immediate threat of repeated injury." *O'Shea v. Littleton*, 414 U.S. 488, 495 (1974); *Dudley v. Stewart*, 724 F. 2d 1493, 1494 (11th Cir. 1984). In properly certified class action suits, assuming *arguendo*, that the case becomes moot as to some class members, the action as to all class members does not also become moot. In *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 755-56 (1976), the Court held that the subsequent mooting of a class representative's claim for relief does not moot the claims of the entire class. *Sosna v. Iowa*, 419 U.S. 393, 401 n.10 (1975).

Mootness issues in a class action differ from those in non-class actions; in a class action, the claim for the class as a whole

is capable of repetition yet evading review and thus staves off arguments of mootness. *Zablocki v. Redhail,* 434 U.S. 374, 383 n.9 (1978). *Sosna, supra, Dudley, supra.* Therefore, once a class is properly certified, as herein, even the moot claims of the class representative may proceed to decision, because the class acquires "a legal status separate from the interest asserted by the plaintiff" *Sosna,* 419 U.S. at 399.

A. Class Action Petitioners Are Receiving Reduced Wages and Fringe Benefits as a Result of Becoming Employed by the Successor Employer.

In this case, if anything has occurred, it has been the entrenchment of the injuries. With the performance of each hour of work by the class action petitioners hired by EG&G, the economic injuries suffered by them become even more remarkable. The injuries suffered by the class action employee hired by EG&G, as illustrated above, are concrete. These continuing economic injuries, standing *alone* are sufficient to defeat any assertion of mootness. *Dudley,* 724 F. 2d at 1494.

However, the district court on remand, and the Eleventh Circuit adopted the respondents' argument that some former ESI employees (and some new EG&G employees engaged in roads and grounds maintenance) have mooted their class action claims and the claims of *all* former ESI employees, including those not hired by EG&G, by the "voluntary" decision to be represented by a union. The parties stipulated *only* that those class action employees employed by EG&G, working on the roads and grounds contract, became subject to an existing collective bargaining agreement in October, 1983. *See* 27a (Joint Stipulation ¶5). The parties did not stipulate that any former ESI employees who were hired by EG&G, became union members. Some of these EG&G employees may only be agency shop fee payers and not "voluntary" union members. The lower court cited no testimony or evidence in support of its holding, nor did the respondents

present evidence concerning whether *all* class action employees have joined or voted for the union.

The conclusion that all the injured class action employees voluntarily joined a union, without consideration of the discriminatory impact the SCA Amendments had already had upon employee wages and fringe benefits, is wholly unsupported by evidence, testimony or logic. The more logical conclusion from the evidence on the record in this case is that those petitioner employees hired by EG&G, who previously voted against the same union and thereby chose not to associate as union members, voted for union representation only to protect their wages from the continuing discriminatory impact of the 1972 Amendments to the Service Contract Act.

The voluntary nature of the class action employees joining a labor union is similar to the voluntary concessions sought in *Deerfield Medical Center v. City of Deerfield Beach,* 661 F.2d 328 (5th Cir. 1981). In that case, the plaintiffs sought to establish a medical facility within the City of Deerfield Beach which would provide, among other medical services, abortion services. The City Commission, upon learning of the intent to provide abortion services, denied the plaintiffs an occupational license. However, the City Commissioners informed the plaintiffs if they voluntarily surrendered the abortion services aspect of the medical facility, the City Commission would look more favorably upon them and grant an occupational license.

The defendants in *Deerfield Medical Center* sought, through the use of their superior economic strength, to coerce the surrender of constitutional guarantees, *viz.,* the right to privacy. Likewise, the respondents herein, and EG&G, sought to coerce the surrender of certain First Amendment rights, including the right to freely associate.

The only issue raised, briefed and argued by the parties on remand was the issue of whether class action petitioners had been damaged economically when employed by EG&G, such that their claims were not moot. As the district court affirmatively noted, the Department of Labor indeed *admitted* that class action petitioners *lost,* at the very least, *certain amounts* of fringe benefits, because of the adverse impact of Section 4(c) of the Act (21a). These losses have never been repaid. Therefore, because of the continuing economic injuries, the class action employees claims are not moot.

B. Even if No Loss of Wages and Fringe Benefits Upon Reemployment by a Successor Contract Could Be Shown, the Class Action Employees' Claims Are Not Moot.

The district court held in October 1982 that:

> [B]ecause the employees are not covered by a collective bargaining agreement, they have received a wage determination covering the new contract which, arguably, is substantially lower than one to which they would have been entitled had they been unionized and covered by such an agreement. Because of this, the SCA has already affected them by treating them, again arguably, differently than union employees in denial of equal protection guarantees.

Memorandum opinion (10a). These past and continuing unremedied injuries suffered by the class action employees are sufficient to prevent the class action employees' claims from being moot.

For several years, the previously non-union class action employees were subject to wage determinations which were

substantially lower than a wage determination that would have been issued had they been subject to a collective bargaining agreement.

The district court noted the potential for financial injury to the class action employees in its memorandum opinion (10a) and, moreover, observed that "[t]o the extent that this may encourage the class action plaintiffs to unionize, the Court is not surprised." (15a). The class action employees' wages and fringe benefits continue today to lag far behind what they would have been if a collective bargaining agreement required for the amendments' protection existed. The class action employees stood idle in the past as the wage determinations for wages and fringe benefits of union employees at KSC increased significantly. They suffer today financially from the failure of the Act to protect their interests. Their claims cannot therefore be moot.

Neither the wages paid by ESI from January through June 1983 nor the continued employment of the majority of these employees by EG&G has restored to all the employees the status they would have enjoyed had they chosen a union and become subject to a collective bargaining agreement. The class action employees' contention that these unremedied damages resulted from the unconstitutional amendments to the SCA continues to be a viable, live controversy with the government respondents. That controversy survives the expiration of ESI's contract with NASA, the issuance of new wage determinations, and the employment of many class action employees by EG&G, even if the additional economic injury shown above did not exist. *See Abood v. Detroit Board of Education,* 431 U.S. 209, 216 n.9 (1977).

Furthermore, the discriminatory harm of the amendments to the SCA are not mooted because some of the class action employees now have the protection of a union contract. Their harm continues since they have previously surrendered a

fundamental right by joining the union to come within the SCA's protection. Further, they must forfeit their non-associational right to refrain from unionization to remain within the amendment's protection. In sum, many class action employees must continue to be union members, arguably against their will, to retain the protection of the SCA. Thus, their claims cannot be moot.

In *Super Tire Engineering Co. v. McCorkle,* 416 U.S. 115 (1974), the Court considered a contention of mootness regarding a factual situation not unlike the case at bar. In *Super Tire,* striking employees of Super Tire were entitled to economic assistance through a state welfare program, and the employer sought a declaration that such assistance was preempted by federal labor law and thus invalid under the Supremacy Clause. Before trial the strike was settled and the employees went back to work. The Court held that the case was not moot, focusing upon plaintiff's claim:

> New Jersey has declared positively that able-bodied striking workers who are engaged, individually and collectively, in an economic dispute with their employer are eligible for economic benefits. This policy is fixed and definite. It is not contingent upon executive discretion. [Footnote omitted.] Employees know that if they go out on strike, public funds are available. The petitioners' claim is that this eligibility affects the collective-bargaining relationship . . . so that the economic balance between labor and management, carefully formulated and preserved by Congress and the federal labor statutes, is altered by the State's beneficent policy toward strikers. . . . In this sense petitioners allege a colorable claim of injury from an extant and fixed policy directive of the State of New Jersey. That claim deserves a hearing.

416 U.S. at 123-24.

Analogizing the Court's holding in *Super Tire* to the case at bar, Congress declared in the amendments to the Service Contract Act that wages and fringe benefits of unionized service employees subject to a collective bargaining agreement are to receive certain protections not afforded to non-union service employees. This congressional policy has been "fixed and definite" in its statutory and administrative forms for more than twelve years.

The class action employees know that if they become non-union, they will receive less economic protection than if they remain unionized and subject to a collective bargaining agreement. The class action employees assertion that this lack of equal protection affects their First Amendment right to associate or not to associate states a "colorable claim of injury from an extant and fixed policy directive" by Congress, and that claim cannot be said to have been mooted by any development which has taken place thus far.[7] The only development which arguably could moot the class action case would be repeal of the amendments to the SCA, although, even if Congress repealed the amendments, petitioners would have a live controversy in regard to the damages they have suffered in the past.

The class action petitioners complaint arose out of the ever-changing environment of government service contracts, where

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7. *See also, Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Assoc.*, 457 U.S. 702 (1982), where the Court held that the employer's lawsuit regarding the union's refusal to handle goods bound for the Soviet Union was not mooted by President Reagan's lifting of the embargo on goods shipped to the Soviet Union and the union's subsequent agreement to again handle such goods. The court noted that a work stoppage could resume at any time.

stability is rare.[8] The class action employees' claims thus also fall within the well-recognized doctrine that permits courts to review claims which are "capable of repetition but evading review," since the bargaining unit could decertify the union and once again suffer financial losses and lower wage determinations. In numerous recent cases, the Court has recognized the applicability of this doctrine. *See e.g., First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978); *Securities and Exchange Commission v. Sloan,* 436 U.S. 103 (1978); *Gannett Co., Inc. v. De Pasquale,* 443 U.S. 368 (1979). As noted in *Super Tire Engineering Company, supra,* often "[t]he important ingredient in these cases was governmental action directly affecting, and continuing to affect, the behavior of citizens in our society." 416 U.S. at 126. In *Super Tire,* the Court held that termination of the labor strike which had prompted the plaintiffs to challenge state policy did not moot the lawsuit where the policy "continue[d] in force, unabated and unreviewed." *Id.*

Petitioners unquestionably would be subject to a lack of equal protection if they choose to decertify the union at any time in the future. It is this lack of equal protection which undoubtedly influenced some of the employees to again unionize and which compels them to remain members of a union and subject to a collective bargaining agreement. Consequently, on the basis of either the continuing harm the class action employees suffer or their reasonable expectation that the same circumstances which initially compelled plaintiffs to file this lawsuit will reoccur, their claims are not moot.

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8. Indeed, one of the purposes of the SCA was to provide greater stabilization for the employment and livelihood of service contract workers.

II.

FIRST AMENDMENT INJURIES ARE NEVER MOOT UNTIL ACCOMMODATED.

The infringement on constitutional liberties demands that this Court grant the writ of certiorari, because in its present posture, the case conflicts with long established Supreme Court and even Eleventh Circuit precedents.

"So long as the person or group mounting a constitutional challenge confronts continuing harm or a significant prospect of future harm, the case cannot properly be deemed moot." Tribe, *American Constitutional Law*, 63 (1978). In fact, as this Court noted in *Elrod v. Burns*, 427 U.S. 347, 373 (1976), "[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *See also, Deerfield Medical Center, supra* at 338; *Cate v. Oldham*, 707 F. 2d 1176, 1188 (11th Cir. 1983).

This Court has previously dismissed mootness arguments in cases which have involved the assertion of fundamental constitutional rights. In *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 (1968) the Court dismissed the respondents' mootness arguments because of the existence of unresolved disputes which continued unabated. At issue in *Carroll* was the First Amendment guarantee of free speech. The respondents argued that the petitioners' claim was moot because a 10 day injunction which had prohibited the petitioners from staging a rally had expired. The Court determined that the case was not moot because of the "continuing vitality of petitioners (constitutional) grievance." *Carroll*, 393 U.S. at 179,.

In *Village of Belle Terre v. Borass*, 416 U.S. 1 (1974) a village ordinance restricting land use to one family dwellings with a very

narrow definition of "family" was challenged by the landowner and the then present tenants under 42 U.S.C. §1983. The tenants did not fall within the ordinances narrow definition of family. Based upon the continuing effect the zoning ordinance had upon real estate value, the ability to rent the premises, and most importantly, the continuing infringment on constitutional rights, the Court declined to find the claims moot.

In an analogous setting in *Allee v. Madrano*, 416 U.S. 802 (1974), this Court found injunctive relief appropriate where workers were discouraged from exercising their constitutionally protected rights of free expression, assembly and association. Justice Douglas, writing for the Court, stated the class action petitioners' claims were not moot:

> Nor can it be argued that the case has become moot because appellees have abandoned their efforts as a result of the very harassment they sought to restrain by this suit. There can be no requirement that appellees continue to subject themselves to physical violence and unlawful restrictions upon their liberties throughout the pendency of the action in order to preserve it as a live controversy. . .

Id., at 810.

As in the *Allee* case, the class action employees in this case have suffered harassment, albeit economic injury instead of physical harm. There is no constitutional requirement that litigants continue to suffer the economic harms of the discriminatory statutes and the unlawful restraints upon their liberties throughout the pendency of an action in order to preserve their claim as a

live controversy.[9] In *Perry v. City of Fort Wayne*, 542 F. Supp. 268, 274 (N.D. Ind. 1982), that court held that while the loss of employment, standing alone, was not an irreparable injury, when added to an infringement on First Amendment guarantees there exists, irreparable injury. This analysis is persuasive. The loss of employment may be remedied economically, but First Amendment freedoms, past, present and future can in no way be remedied through economic means. Thus, First Amendment freedoms are jealously guarded because of the fear that "persons will be deterred, even if imperceptibly from exercising those rights in the future." *Cate v. Oldham, supra,* at 1189. *Buckley v. Valeo*, 424 U.S. 1, 22 (1976) (First Amendment protects even future possible associations).

The "chilling effect" of the 1972 SCA Amendments on the class action petitioners' associational rights has been amply demonstrated by their economically-coerced decision to be represented by a union in order to mitigate the economic harms which have already penalized them under the SCA Amendments. This direct penalization, as opposed to incidental inhibition of First Amendment rights, constitutes irreparable injury. *See Johnson v. Bergland*, 586 F. 2d 993 (4th Cir. 1978) (transfer of employment on account of association with political party as irreparable injury). So long as this penalty upon associating again as non-union employees exists, this dispute remains concrete and class action petitioners' claims are not moot. *City of Los Angeles v. Lyons*, ____U.S.____, 103 S. Ct. 1660, 1669 (1983) (no mootness if there exists "a live and active claim").

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9. Similarly, in *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 126 (1974), the Court noted that termination of a labor strike which had prompted the plaintiffs to challenge the policy of providing unemployment benefits to strikers did not preclude a continuing challenge where the policy "continued in force, unevaded and unreviewed."

As recognized by this Court "regardless of the current status of appellee's individual claim, the dispute over the statutes constitutionality remains live with respect to members of the class appellee represents. . . ." *Zablocki v. Redhail*, 434 U.S. 374, 383, n. 9 (1978).

CONCLUSION

This matter is one of first impression for the Court involving the mootness of a serious associational challenge to a federal statute. For this reason, petitioners respectfully request that a writ of certiorari issue to review the judgment of the court of appeals.

Respectfully submitted,

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September 27, 1984

APPENDIX A — MEMORANDUM OPINION

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FILED OCT. 1, 1982
CLERK
U.S. DISTRICT COURT

Case No. 81-31-Orl-Civ-Y

EXPEDIENT SERVICES, INC., and JOHN CURRY, RALPH RHINELANDER and RICHARD FRAZIER, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

JAMES M. BEGGS, Administration of the National Aeronautics and Space Administration; and RAYMOND J. DONOVAN, Secretary of Labor,

Defendants.

MEMORANDUM OPINION

This action involves application of the Service Contract Act of 1965, as amended (SCA), 41 U.S.C. §351, *et seq.*, to the procurement of a new roads and grounds contract at Kennedy Space Center, Florida (KSC). Plaintiffs are the contractor under the existing contract, Expedient Services, Inc. (ESI), and certain ESI employees, who represent a class of all hourly, non-supervisory ESI employees. The Defendants are the National Aeronautics and

Space Administration (NASA) and the Department of Labor (DOL).

ESI was awarded the roads and grounds contract in 1977.[1] The contract was originally for a term of two years, with two one-year, non-competitive options. Both options were exercised. Pursuant to NASA procurement regulations, the roads and grounds contract was to be competitively re-let in 1980. The procurement of the new contract is what sparked this lawsuit.

THE SCA

The SCA is designed to prevent the depression of government contract employees wage rates resulting from the operation of the federal procurement process.

To accomplish this goal, the SCA provides that every service contract, and every bid specification therefor, contain provisions specifying the minimum wages and fringe benefits to be paid the service employees under the contract. These minimums are determined by the DOL and set forth in what are commonly called "wage determinations".

As originally enacted, the SCA called for all wage determinations to be made in accordance with the prevailing rates for each class of service employees in the locality. In 1972, the SCA was amended (Section 2(a)(1) and 2(a)(2)) to require that where a collective bargaining agreement covers the service employees, the wage determinations are to be in accordance with

1. The majority of material facts involved in this case are not in dispute. A joint statement of admitted facts is attached to this Memorandum Opinion (Exhibit A).

the rates for such employees provided for in such agreement, including prospective wage increases contained in the agreement, if they were obtained as a result of arm's length negotiations. Where the employees are not covered by a collective bargaining agreement, the wage determinations are still made in accordance with the prevailing rate in the locality standard. 41 U.S.C. §351.

The 1972 amendments also added Section 4(c), which provides (at 41 U.S.C. §353(c)):

> No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: *Provided,* That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.

Under Section 4(c), when a contract is to be re-let, the minimums which the successor contractor must pay can be no less than those his predecessor would have been required to pay if the predecessor's employees were covered by a collective bargaining agreement (unless the provision of Section 4(c) is brought into play).

Appendix A

THE PROCUREMENT AT ISSUE

Prior to ESI receiving the roads and grounds contract in 1977, all general maintenance type work at KSC was performed by the Boeing Company under a center-wide support service contract. When the roads and grounds contract was broken out of the larger contract in 1977, DOL issued a wage determination applicable to the work assumed by ESI under the new contract. Because Boeing's employees under the center-wide support contract were covered by a collective bargaining agreement, the wage determination reflected the rates contained in the bargaining agreement, pursuant to Section 4(c) of the SCA. That wage determination was WD 77-244 (Rev.-1).

ESI employed many of the Boeing employees who performed the same services under the predessor contract. ESI's employees continued, initially, to be represented by the union that represented them with Boeing. Late in 1977, however, ESI's employees voted to decertify the union. They continue to date to be "non-union employees".

In 1978, NASA notified the DOL of its intention to exercise the first one-year option of ESI's contract. The DOL issued a wage determination applicable to the contract extension, WD 78-817. In 1979, the DOL issued wage determination 78-817 (Rev. 1) applicable to the second one-year extension of the contract. Both of these wage determinations were based on the prevailing rates in the locality, since ESI's employees were no longer covered by collective bargaining agreement.

In 1980, NASA informed the DOL of its intention to re-let the roads and grounds contract on a competitive basis. In response, DOL issued wage determination 78-817 (Rev.-2), which was again

based on the prevailing rates in the locality. That wage determination was utilized in NASA's solicitation of bids for the new roads and grounds contract. The rates set forth in WD 78-817 (Rev.-2) were substantially below the rates which ESI was actually paying its employees.

The events to this point in time focus the dilemma which ESI faced in bidding on the new roads and grounds contract. Any contractor bidding on the new contract would only be required to pay the minimum rates set forth in WD 78-817 (Rev.-2). Because these rates were substantially below the rates ESI was actually paying, ESI would have to lower its rates to bid competitively on the contract. If ESI's employees had still been covered by a collective bargaining agreement, however, the wage determination would, presumably, have been in accordance with such agreement. Thus, all bidders on the new contract would have been required to pay, at the least, ESI's current rates. ESI could then bid on the new contract, utilizing its current rates, and remain competitive in the bidding process.

ESI protested to the DOL and NASA about the rates and job classifications set forth in wage determination 78-817 (Rev.-2). The DOL subsequently issued wage determination 78-817 (Rev.-3), which was identical to the actual rates and job classifications of ESI's employees under the second one-year option of ESI's contract. NASA received the new wage determination after the closing of bids on the new roads and grounds contract. NASA continued to utilize wage determination WD 78-817 (Rev.-2) in the procurement process, pending clarification from the DOL as to the appropriateness of the new wage determination. The appropriateness of the new wage determination was affirmed by DOL in December of 1980 and again in January of 1981.

Appendix A

During this period of time, ESI continued to perform its work at KSC pursuant to monthly extensions of their contract. On January 29, 1981, Plaintiffs filed this lawsuit to halt procurement of the new contract upon the basis of wage determination WD 78-817 (Rev.-2). This Court entered a temporary restraining order granting that relief. The Court was advised that the DOL would be issuing a new wage determination. The parties stipulated to continuance of the temporary restraining order pending issuance of the new wage determination and allowing time for the parties to object to it.

In April of 1981 the DOL issued wage determination 78-817 (Rev.-4) also, which contained rates lower than those paid by ESI. Both ESI and NASA raised objection to this wage determination. Eventually, in April of 1982, wage determination 78-817 (Rev.-5) was issued by DOL. It contained rates even lower than 78-817 (Rev.-4) and 78-817 (Rev.-2). All these wages determinations were formulated under the prevailing rate in the locality standard.

Plaintiffs amended their complaint to reflect the existance of wage determinations 78-817 (Rev.-4) and (Rev.-5). Additionally, Plaintiffs added claims that NASA had refused to grant an increase in wages during the pendency of this action in retaliation to plaintiff filing this lawsuit. Throughout this time, ESI continued to perform its work under monthly extensions of its contract. NASA eventually withdrew the procurement which formed the basis of this lawsuit. The new roads and grounds contract is scheduled to be included in a larger base-wide procurement to be let in early 1983. ESI has not bid on the new base-wide contract. ESI has accepted an extension of its original contract through at least January 31, 1983, with two options through early 1983.

Appendix A

ISSUES RAISED

Plaintiffs assert that the 1972 amendments to SCA are unconstitutional because they deny non-union employees equal protection. In essence, because ESI's employees are not covered by a collective bargaining agreement, they are subject to wage determinations based on the prevailing rates in the locality standard. As the facts of this case reveal, under such a standard they are subject to *potential* reductions in wage rates and fringe benefits. If they were covered by a collective bargaining agreement, they maintain they would be guaranteed their present rates in any reletting of their contract.

Plaintiffs further challenge the appropriateness of the wage determinations issued by DOL. Finally, they challenge NASA's refusal to incorporate wage determination 78-817 (Rev.-3) into the procurement of the roads and grounds contract and challenge NASA's refusal to grant a wage increase during the pendency of this lawsuit as being a reprisal for the filing of this lawsuit.

MOTION TO DISMISS

On August 30, 1982, this cause came on before the Court on non-jury trial. Prior to trial, defendants had moved to dismiss or, in the alternative, for summary judgment. The Court reserved ruling on the motion. The Court now dismissed part of plaintiffs' action.

Plaintiffs challenge NASA's refusal to utilize wage determination 78-817 (Rev.-3) in the procurement of the new roads and grounds contract and DOL's issuance of wage determinations 78-817 (Rev.-2), (Rev.-4) and (Rev.-5). See Counts III and IV of plaintiffs amended complaint. This challenge is brought under the Administrative Procedures Act, 5 U.S.C. §701, *et seq.* (APA).

Appendix A

Regardless of any other issues of standing (discussed *infra),* it is clear that Plaintiffs' claim against NASA for failing to utilize wage determination 78-817 (Rev.-3) in the procurement process has been fully mooted by the issuance of the subsequent wage determinations. As Plaintiffs' complaint itself makes clear, NASA is bound by the SCA to adopt the DOL wage determinations. This Court cannot order NASA to accept wage determination 78-817 (Rev.-3), now that it has been superceded by DOL. Therefore, Plaintiffs' APA based claim against NASA must be dismissed.

The allegations of Count III and IV against the DOL amount to a challenge of the appropriateness of the wage determinations. As will be discussed, the Court finds jurisdiction to review the wage determinations and plaintiff *employees* may maintain this claim. As to Plaintiff ESI, its challenge as to the appropriateness of the wage determinations has been mooted.

It is undisputed that ESI has not and will not bid on the new roads and grounds contract, since it is now to be let as part of the larger base operations contract. The specifications for the new base operations contract reveal that wage determination 78-817 (Rev.-5) has been utilized for the roads and grounds work under the contract. Regardless of this Court's ruling on the appropriateness of that wage determination, ESI will have nothing to gain by the Court's determination.[2]

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2. To the extent ESI claims standing to challenge the appropriateness of the wage determinations based upon an injury in the nature of costs in bidding on the new roads and grounds contract, such injury still does not confer standing. The injury cannot be said to have been incurred in *reliance* upon a wage determination which was ultimately found to be improper. ESI's complaint makes clear that it has never relied upon the appropriateness of the wage determinations it challenges.

Appendix A

Although it may be argued that ESI's challenge to the wage determination is only mooted by NASA's actions, this case does not fall under the recognized exceptions to the mootness doctrine. See, e.g. *United States v. Concentrates Phosphate Export Asso.*, 393 U.S. 199 (1968). The Court, having heard the evidence in this cause, is satisfied that NASA is going forward with letting the roads and grounds work under the base operations contract. In any event, the Court will address the *employees'* challenge to the wage determination. Thus, the issue will not evade review. ESI's claim addressing the appropriateness of the wage determination must, therefore, be dismissed.

The plaintiffs' constitutional challenges are found in Count I and II of the amended complaint. Defendants urge that neither ESI nor the employees have standing to mount these challenges. The Court finds the employees do have standing, but that ESI does not.

Again, ESI does not have a personal stake in the outcome of this action because of the changed circumstances. Regardless of any threatened injury or whether ESI's interests fall within the zone of interests to be protected by the SCA, this Court's ruling on the constitutional issues can in no way affect ESI. For the same reasons as set forth above regarding the mootness of ESI's challenge to the wage determinations, ESI's constitutional claims must be dismissed. And, once again, since the Court does find the employees have standing on these issues, the issue will not evade review.

In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, ____ U.S. ____, 102 S.Ct. 752 (1982), the Supreme Court recently again addressed the issue of standing as a necessary ingredient to satisfy the case and

controversy requirements of Article III of the Constitution. To have standing, at an "irreducible minimum", a plaintiff must

> "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," . . . and that the injury "fairly can be traced to the challenged action" and is likely to be redressed by a favorable decision" . . . (citations omitted)

In the present case, the Court must indulge in some speculation to find that the employees have standing. But the undisputed facts in this case serve as a firm basis for such speculation. First, although the employees have no guarantee that they will be hired by the new contractor when the base operations contract is let, the past practices at KSC reveal a substantial likelihood that the majority of the employees will be so hired. Second, because the employees are not covered by a collective bargaining agreement, they have received a wage determination covering the new contract which, arguably, is substantially lower than one to which they would have been entitled had they been unionized and covered by such an agreement. Because of this, the SCA has already affected them by treating them, again arguably, differently than union employees in denial of equal protection guarantees. There is a potential, threatened, financial injury should NASA award the base operation contract to a contractor who will only pay the employees the minimum set forth in the wage determination. Finally, if the Court were to find the SCA amendment unconstitutional, the Court could fashion a remedy to redress the situation.

The Court is satisfied that the employees meet the requirements of *Valley Forge, supra.* From the facts in this case,

it is also clear that the employees have such a personal stake in the outcome of these issues that they have presented them with the necessary adverseness and vigor. See *Flast v. Cohen,* 392 U.S. 83 (1968).

Defendants further urge dismissal of plaintiffs' claims that NASA has unlawfully retaliated against it for the filing of their lawsuit. See Counts V & VI of the complaint. The defendants suggest such claim is solely within the jurisdiction of the Court of Claims. As will be discussed, the Court disagrees, and denied that part of defendants' motion.

Having ruled on the defendants' motion to dismiss, there remain the following issues for determination.[3] One, the employees' constitutional challenge to the SCA amendments. Two, the employees' challenge to the appropriateness of the wage determinations. Three, plaintiffs' claim of NASA's retaliation for filing this lawsuit. The issues will be discussed in the above order.

CONSTITUTIONAL CLAIMS

Plaintiff employees assert that the amendments to the SCA, on their face, unconstitutionally deny them equal protection of the law. Under Section 2(a)(1) and 2(a)(2) of the SCA, their wage determinations are based upon the prevailing rate standard, while wage determinations for employees covered by a collective bargaining agreement are in accordance with the rates in such agreements. Thus, ESI's employees are subject to issuance of wage determinations which can be substantially below their actual rates, if the prevailing rate is low. Plaintiff employees assert that this

3. The Court having heard the evidence, any ruling based on Defendants alternative motion for summary judgment would be senseless.

cannot occur to union employees whose wage determinations are set in accordance with their collective bargaining agreements.

Further, under Section 4(c) of the SCA, the Plaintiff employees argue that they are treated unequally when a successor contractor takes over a contract. A successor contractor to a contract under which employees were covered by a collective bargaining agreement, must pay his employees no less than the rates his predecessor would have paid under such agreement. For employees such as ESI's however, the successor contractor is only required to pay minimums set forth in wage determinations, and those rates may be below the employees actual rates, because they are based in the prevailing rate standard.

Because employees covered by a collective bargaining agreement have wage determinations issued in accordance with those agreements, while employees such as ESI's have wage determinations based on prevailing rates, Plaintiff employees assert, essentially, that union employees are "guaranteed" their rates while they are not. This argument, however, fails to take into account the proviso found in Section 4(c) of the SCA. That proviso reads:

> That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.

The proviso operates not only where a successor contractor is involved under Section 4(c), but also when wage determinations

are issued for the initial letting of a contract, and for wage determinations issued for an on-going contract.[4]

The proviso is designed to prevent the disparate treatment which Plaintiff employees fear. For example, if in fact ESI's employees were covered by a collective bargaining agreement, their wage determination would reflect the rate in such agreement. If a hearing was had, however, it would undoubtedly be found that ESI's employees' rates were substantially at variance with the prevailing rates, since plaintiffs acknowledge that their actual rates are well above those set forth in the current wage determination. (This, of course, assumes those wage determinations are correct.) Thus, the wage determination would not have to reflect ESI's employees' collective bargaining agreement. In short, they would have no guarantee that their rates would continue to be reflected in the wage determination.

The proviso in Section 4(c) of the SCA eliminates the argument that rates are guaranteed to union employees covered by a collective bargaining agreement. There being no such guarantee, there is no unequal treatment and plaintiffs' challenge to the constitutionality of the amendments on their face must fail.

Plaintiff employees real constitutional challenge is that the amendments to the SCA are being applied (or not applied) in a discriminatory manner which results in a denial of equal protection. Simply stated, the proviso of Section 4(c) of the SCA is never enforced at KSC. The testimony at trial revealed that the majority of service contract employees covered by collective bargaining agreements are receiving rates substantially at variance with those prevailing in the locality. In spite of this, only one

4. Cf., Senate Report No. 92-1131, 92nd Cong. 2d Sess. (1972).

variance hearing under Section 4(c) of the SCA appears to have ever been initiated, and that hearing was initiated by a union to *increase* rates.

This state of affairs presents this Court with a unique problem. It is well established that a law, constitutional on its face, may be applied so arbitrarily and unfairly as to amount to a violation of constitutional rights. *Yick Wo v. Hopkins,* 118 U.S. 356. In a usual case of discriminatory enforcement, a law is selectively enforced *against plaintiff* and not against others similarly situated. In this case, however, there is no indication that other non-union employees are not receiving wage determinations based on the prevailing standard, instead, the problem arises from failure to enforce the proviso of Section 4(c) *against union employees* covered by collective bargaining agreements.

Through the failure to so enforce the proviso, the employees covered by a collective bargaining agreement are receiving better treatment than they deserve. It cannot be said, however, that plaintiff employees are receiving any *lessor* treatment than they deserve.

Acknowledging the failure to enforce the proviso of Section 4(c) of the SCA, the problem facing the Court is what it should do about the lack of enforcement. Plaintiff employees have not asked the Court to compel the holding of variance hearings to bring the other service contract wage determinations into line with the prevailing rates. What the employees ask, in essence, is that the Court compel issuance of wage determinations covering the employees which are just as much out of line with the prevailing rates as the union employees. This the Court will not do.

Appendix A

Again, plaintiff employees are not receiving anything less than they are entitled to under the SCA, in spite of the failure to enforce the proviso in Section 4(c). The effect of the failure to enforce the proviso is that union employees covered by a collective bargaining agreement are receiving more than that to which they are entitled. To the extent that this may encourage plaintiff employees to unionize, the Court is not surprised. But there is nothing in the SCA which prevents plaintiff employees themselves from requesting the variance hearings if they wish to have the union employees wage determinations brought into line with the prevailing rates. In fact, the regulation promulgated under the SCA provides that the variance hearing may be requested by, inter alia, a "person affected or interested", 29 C.F.R. §4.10(b)(4). Plaintiff employees would certainly appear to be qualified to request the hearing. The Court realizes that it is suggesting plaintiff employees do what should normally be done by the contracting party or the agency. But, if plaintiff employees want to eliminate the incentive to unionize which they perceive, it is not asking too much for them to request that the SCA be enforced as designed.

In summary, the amendments to the SCA are constitutional on their face. The lack of enforcement of the amendments as designed, does not deprive plaintiff employees of anything, although it does give union employees benefits which they do not deserve. To the extent that this encourages unionization, the plaintiff employees have the right to request enforcement of the SCA as designed and eliminate that effect. The non-enforcement of the proviso does not entitle plaintiff to have equally improper wage determinations issued to cover their contract.

REVIEW OF WAGE DETERMINATION

Plaintiff employees have challenged the appropriateness of wage determinations 78-817 (Rev.-2), (Rev.-4) and (Rev.-5). Since

(Rev.-5) is the wage determination applicable to the roads and grounds work under the new base operation contract, that is the only wage determination which is appropriate for review.

Initially, the scope of this Court's review of the wage determination is in issue. In addressing this issue, defendants point to the similarities between the SCA and the Davis-Bacon Act, 40 U.S.C. 276, *et seq.* Under Davis-Bacon, wage determinations are not subject to judicial review except, possibly, to determine whether the DOL failed to follow the mandates of Davis-Bacon, DOL regulations or otherwise violated due process concerns. See *Universities Research Assn. v. Coutu,* 450 U.S. 754, 761, fn.10 (1981). Defendants urge that judicial review of wage determination issues under SCA should be similarly limited. The Court is not persuaded by this argument and its review of the wage determination will not be so limited. Absent a clear legislative expression to the contrary, the Court follows the presumption in favor of review ability under the APA.

Plaintiff employees, essentially, raise two objections to the wage determination in question, WD 78-817 (Rev.-5). They contend that the locality upon which it is based is improper and that it fails to take into account the "unique" character of work performed by the employees.

On November of 1981, the DOL announced its decision to consider wage data from Brevard County in all future prevailing wage determinations issued for KSC. Prior to that time, the KSC complex itself had been utilized in the process as a separate locality "enclave". The Court having heard and reviewed all the evidence, it finds that the decision to utilize Brevard County as the locality in formulating the prevailing rates was a proper exercise of DOL's discretion. See *Kentron Hawaii, Limited v. Warner,* 480 F.2d 1166 (D.C. Cir. 1973).

Appendix A

The Court also has heard and reviewed the evidence regarding the "uniqueness" claim. There was adequate, competent evidence from which the DOL could have determined that the employees work is not unique. Therefore, the Court has no choice but to give deference to the decision of the DOL.

CONSTITUTIONAL CLAIM RELATING TO SUSPENDED COST INCREASE

Plaintiffs finally assert that NASA has discriminated against them for the filing of this lawsuit by refusing to grant an increase to the employees effective July 1, 1981 (while this litigation was proceeding). Plaintiffs assert this to be a violation of their free access to the courts and a violation of due process.

As noted, defendants maintain that this claim is solely within the jurisdiction of the Court of Claims. To the extend that plaintiffs seek recovery of the suspended wage increase, the Court agrees. On the other hand, plaintiffs have asserted constitutional claims over which this Court arguably has jurisdiction. These claims are limited to the alleged discrimination in violation of plaintiffs rights of free access to the Court and the due process claims. The Court is of the opinion that plaintiffs have failed to establish these claims. NASA asserted its refusal to grant the increases pending this litigation because of the temporary restraining order entered in this cause. Although it is questionable that such course was necessary to maintain the status quo, it has not been established that such action was "calculated" to discriminate against plaintiffs and to deny them due process.

The Court stresses that this ruling in no way is meant to express any opinion as to plaintiffs reasserting their claims on the suspended wage increase with the NASA Board of Contract

Appeals. This holding is strictly limited to plaintiffs allegations of constitutional violations.

Based on the foregoing, judgment will be entered for defendants and against plaintiffs.

DONE and ORDERED in Chambers at Orlando, Florida this 4th day of October, 1982.

s/ Elizabeth A. Kovachevich
UNITED STATES
DISTRICT JUDGE

Copies furnished to:

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Orlando, Florida 32801

APPENDIX B - ORDER

EXPEDIENT SERVICES, INC., John Curry, Ralph Rhinelander, and Richard Frazier, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants.

v.

James M. BEGGS, Administrator of the National Aeronautics and Space Administration, and Raymond J. Donovan, Secretary of Labor. United States Dept. of Labor, Defendants-Appellees.

No. 82-3166

United States Court of Appeals,
Eleventh Circuit.

Dec. 27, 1983.

Appeal from the United States District Court for the Middle District of Florida.

Before FAY and HENDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

Appellees have urged that this appeal should be dismissed for mootness. The parties do not agree on the factual occurrences since the entry of the judgment in the district court. In order that we may properly address this issue we remand the matter to the district court and request that proceedings be had so as to allow the making of additional findings surrounding the issue of mootness. We request that this be done within ninety (90) days. Jurisdiction is retained and the matter will be ruled upon following this limited remand.

APPENDIX C - ORDER ON LIMITED REMAND

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO: 81-31-Orl-Civ-EK

EXPEDIENT SERVICES INC., et al,

Plaintiff(s),

vs.

JAMES M. BEGGS, et al,

Defendant(s),

ORDER ON LIMITED REMAND

This cause comes before this Court upon the limited remand from the United States Court of Appeals, Eleventh Circuit, on December 27, 1983, Case No. 82-3166, a copy of the same attached hereto and is incorporated by reference herein.

Pursuant to the foregoing, this Court enlisted and received the full cooperation of counsels for the parties to expedite this matter, filing herein certain joint stipulations, memoranda arguments, and correspondence, including a Department of Labor examination regarding fringe benefits, all of which the Clerk of this Court is directed to forward to the Appellate Court; this Court has considered all of the aforementioned presentations in order to respond to the request from the Appellate Court "that proceedings be had so as to allow the making of additional findings surrounding the issue of mootness".

Appendix C

This Court re-affirms, in haec verba, its memorandum opinion filed herein on October 4, 1982, wherein the Court endeavored to weave a fabric, tailored to fit this case. Now, post-judgment, the Department of Labor's examination of the fringe benefits, dated March 1, 1984, indicates that "the employees did not receive as much as they would have been entitled to receive if Section 4(c) were applicable".

Assuming arguendo that a party Defendant to this litigation has admitted that the class action employees have subsequently received reduced benefits because of the non-operation of Section 4(c), what legal effect, if any, does that have upon the issues pending in *this* appeal, including the issue of mootness? The Court's response is that it has *none*!

This Court agrees with the cogent arguments which have been well articulated by Defendants/Appellees herein.

> ". . .Through their voluntary actions the class plaintiffs have become represented employees. As such they no longer maintain a legally cognizable interest in having the SCA overturned as a violation of the constitutional rights of *non-union* employees. Since their lawsuit seeks only declaratory relief regarding the impact of the statute on *non-union* service workers there is no remedy which this court can fashion that will have any meaningful effect on the plaintiffs." (Pg. 8 Federal Defendants' Memorandum In Support of Their Suggestion of Mootness. 2/6/84).
>
> "Here plaintiffs no longer have standing to maintain this litigation . . ." (Pg. 11 Federal

Appendix C

Defendants ' Memorandum In Support of Their Suggestion of Mootness. 2/6/84).

". . .the only relief that plaintiffs continue to seek through their appeal, and the only relief that the appellate court could grant, would be a prospective declaration that the 1972 amendments to the SCA are unconstitutional. But plaintiffs, having elected to become union employees, no longer maintain a legally cognizable interest in the relief sought in their lawsuit, their voluntary action in becoming unionized fully moots their claim". (Pg. 16. Federal Defendants' Memorandum In Support of Their Suggestion of Mootness. 2/6/84).

DONE AND ORDERED in Chambers, in Tampa, Florida, this 16th day of March, 1984.

s/ Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All Counsel

APPENDIX D - NOTICE OF DISMISSAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-3166

EXPEDIENT SERVICES, INC., JOHN CURRY, RALPH RHINELANDER, and RICHARD FRAZIER, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

versus

JAMES M. BEGGS, Administrator of the National Aeronautics and Space Administration, and RAYMOND J. DONOVAN, Secretary of Labor, United States Dept. of Labor,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(May 17, 1984)

Before FAY and HENDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge

PER CURIAM:

In December, 1983 we remanded this case to the district court to determine the factual occurrences since the district court entered its judgment. Based upon the record on remand, this appeal is dismissed as moot.

DISMISSED.

APPENDIX E - DENIAL OF PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-3166

EXPEDIENT SERVICES, INC., et al.,

Plaintiffs-Appellants,

versus

JAMES M. BEGGS, etc., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 17, 1984, 11 Cir., 198__, ____ F.2d____).

Before FAY and HENDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule

Appendix E

26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT.

s/ Peter Fay
United States Circuit Judge

APPENDIX F - JOINT STIPULATION

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 81-31-ORL-Civ-EK

EXPEDIENT SERVICES, INC., and JOHN CURRY, RALPH RHINELANDER, and RICHARD FRAZIER, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JAMES M. BEGGS, Administrator of the National Aeronautics and Space Administration, and RAYMOND J. DONOVAN, Secretary of Labor, United States Dept. of Labor,

Defendants.

JOINT STIPULATION

Plaintiffs, EXPEDIENT SERVICES, INC. (ESI) and the class action employees, by and through their undersigned counsel, and Defendants, Administrator BEGGS of the National Aeronautics and Space Administration (NASA) and Secretary DONOVAN, Department of Labor (DOL), by and through their undersigned counsel, hereby enter into this Joint Stipulation pursuant to the December 27, 1983 remand decision of the United States Court of Appeals for the Eleventh Circuit, and stipulate as follows:

Appendix F

1. Subsequent to the decision of the United States District Court dated October 4, 1982, ESI performed the roads and grounds function at the Kennedy Space Center (KSC) as a direct contractor with NASA through December 31, 1982.

2. From January 1, 1983 through June 30, 1983, ESI performed the roads and grounds function at KSC as a fixed price subcontractor of EG&G Florida, Inc., the prime contractor who had been awarded the Base Operations Contract.

3. NASA gave its consent to EG&G to subcontract the roads and grounds function to ESI, and the consent was to total contract price.

4. Beginning July 1, 1983, EG&G began performing the roads and grounds function in-house and hired the majority of the ESI class action Plaintiffs to perform this function.

5. Effective October 3, 1983, the former ESI class action Plaintiffs performing the roads and grounds function as direct employees of EG&G elected to become subject to an existing collective bargaining agreement which was entered into between EG&G and the International Association of Machinists Union (IAM) (Exhibit "A").

6. At all relevant times prior to October 3, 1983, the class action employees were not members of a union nor subject to a collective bargaining agreement.

7. During all relevant times, substantially the same employees (the class action Plaintiffs) performed the roads and grounds functions, and during this time period, the scope of the work called for under the roads and grounds function did not substantially change.

Appendix F

8. The chart set forth as Exhibit "B" states the pay rates for each labor grade for the class action Plaintiffs at the time periods stated in the chart.

9. During the period of time they were employed by ESI, the class action Plaintiffs received various amounts of money as cash equivalents for certain fringes. Certain amounts of this cash equivalent was dedicated to purchasing a group health insurance policy for the employees. The remainder was actually received by the employees as cash. The amount of cash equivalents received by the class Plaintiffs is not in dispute (Exhibit "C").

10. As non-represented employees of EG&G, the class Plaintiffs were covered under a Company-wide health benefits and pension plan. The cost attributed by EG&G to these two benefits was $1.71 per hour. This amount is not in dispute.

11. Under the EG&G health insurance plan, if employees elected dependent coverage under the plan, they were required to pay $38.34 per month for health coverage and $10.14 for dental coverage (Exhibit "D").

12. While the class action employees were employed by ESI, the plan provided for dependent health and dental coverage at no cost to the class Plaintiffs.

13. The class Plaintiffs received various other benefits from each employer. These benefits and the cost attributable to them are in dispute. Exhibit "E" represents the benefits provided by ESI and Exhibit "F" represents the benefits provided by EG&G.

14. ESI's subcontract with EG&G to perform the roads and grounds function was subject to the provisions of the Service Contract Act.

Appendix F

15. Attached as Exhibit "G" is wage determination (WD82-151), dated April 14, 1982.

16. Attached as Exhibit "H" is the affidavit of Contracting Officer Philip Whitaker which was filed with the United States Court of Appeals.

RESPECTFULLY SUBMITTED this 27th day of January, 1984.

COFFMAN, COLEMAN, HENLEY
& ANDREWS
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By s/ William H. Andrews
William H. Andrews

By s/ Robert G. Riegel, Jr.
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Appendix F

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Room 3335
Tenth and Constitution Ave., N.W.
Washington, D.C. 20530

By
June Wagoner Edwards

Appendix F

EXHIBIT A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO: 82-3166

EXPEDIENT SERVICES, INC., et al

Plaintiffs,

vs.

JAMES M. BEGGS, Administrator of The National Aeronautics and Space Administration, et al

Defendants.

Affidavit of: Ralph Rhinelander

STATE OF FLORIDA)
: ss
COUNTY OF Brevard)

We were contacted by EG&G for a meeting to be held Monday afternoon, June 20, 1983 to discuss wages and employment by EG&G.

The offers that were presented did not satisfy anyone in the room. We were told by EG&G representative that the difference in the benefits paid by EG&G would make up the difference in the loss of $1.09 per hour wages and the $2.20 per hour lost in Cash Fringe Equivalence.

Appendix F

However, starting July 1, 1983, $38.00 and something per month will have to be paid by me for my dependent insurance coverage.

At the job appointment there was a lady who sat across the table from me. She handed me a form, copy attached, and said "Mr. Rhinelander, we (EG&G) are happy to make you this offer of $9.14 per hour as a truck driver, will you accept this offer? I have a family to support and bills to pay so I answered yes.

I just hope that by making this statement it will not jeopardize my employment with EG&G due to the fact that I have got to work and support my family. I will continue to perform my job as assigned to the best of my ability.

For the life of me, I cannot understand why we are being discriminated against by Kennedy Space Center in taking such a large cut in wages and benefits which has not happened to any union employee at Kennedy Space Center.

I can readily understand why NASA is trying to cut cost but why pick on one small group to do this.

We as the workers of Roads and Grounds feel that this has happened because of the simple reason that we do not belong to a union.

We were all under the impression that the Service Contract Act forbides wage busting whether union or non union employees.

My statement in the previous sentence was made because of the fact that for the first three (3) years, we were given pay raises at percentages close to the KSC union employees. Then as of 1980 this ceased to prevail.

Appendix F

Since July, 1977 if EG&G pays me $9.14 per hour, my pay (non union) will have increased $2.09 per hour compared to an increase of $4.79 per hour increase for a driver who is union.

I have read the above statement consisting of two (2) pages and it is true and correct to the best of my knowledge and belief.

s/ Ralph M. Rhinelander
Ralph Rhinelander

Sworn to and subscribed before
me this 24th day of June, 1983

s/ Evelyn Ioff
Notary Public, State of Florida
at Large. My Commission expires:
Sept. 28, 1986

Appendix F

EXHIBIT H

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
ATLANTA, GEORGIA

Case No. 82-3166

Expedient Services, Inc., et al.

Plaintiff,

vs.

James M. Beggs, Administrator, National Aeronautics and Space Administration, et al.,

Defendants.

(District Court No. 81-0031)

AFFIDAVIT OF PHILIP F. WHITAKER, JR.

STATE OF FLORIDA :
: ss.
COUNTY OF BREVARD :

Now comes the undersigned, Philip F. Whitaker, Jr., who being first duly cautioned and sworn states, based upon his personal knowledge, or, where indicated, upon his information and belief, that:

1. I am currently employed by the National Aeronautics and Space Administration (NASA) as a Contract Specialist and have

been so employed since 1964. I have held the position of Supervisory Contract Specialist since 1979.

2. During that time my duties have been to act as Contracting Officer and supervise administrative actions of a Contract Specialist on Contract NAS10-9874 which is the most recent extension of a contract between ESI and NASA for performance of the roads and grounds duties at the Kennedy Space Center.

3. At the District Court trial in the above captioned matter, I testified for the defendant and am familiar with the issues in this case. I have reviewed a copy of the decision of the District Court dated October 4, 1982.

4. I signed modifications exercising priced options to extend the period of performance of Contract NAS10-9874 for the months of November and December on October 27, and November 18, 1982, respectively. Labor rates used in costs were those rates used for reimbursement as of June 30, 1981.

5. I signed a modification recognizing overrun costs of $102,555, partially attributable to additional labor hours, on December 21, 1982. Labor rates were the June 30, 1981, rates reimbursed ESI under Contract NAS10-9874.

6. Additional overrun costs of $2,120 for the months of November and December 1982 were recognized in a modification I signed on March 1, 1983, and, in addition, payment of $54,228 for unused vacation and sick leave was authorized. Labor rates paid for the overrun costs and the unused vacation and sick leave were also based on the June 30, 1981 rates.

7. I received a letter dated November 3, 1982, for costs incurred during the period October 16-31, 1982, in which the

contractor stated the vouchers contained wages and benefits equal to those in effect on June 30, 1981, and requested expedited payment since the voucher contained no disputed costs requiring suspension action. The costs were confirmed and payment made. Similar letters were received under dates of November 19, December 3 and December 16, 1982, for subsequent bi-weekly billing periods and were paid in a timely manner.

8. Effective January 1, 1983, the Kennedy Space Center awarded a contract for Base Operations to EG&G of Florida. This contract absorbed the roads and grounds effort previously performed by ESI on a prime contract.

9. EG&G awarded noncompetitive subcontracts to incumbent small business contractors for a period of six (6) months beginning January 1, 1983; this included a subcontract to ESI for the roads and grounds effort for this period. The subcontracts are on a fixed price basis.

10. Pursuant to contract provisions, EG&G submitted the subcontracts to the NASA Contracting Officer for his consent. Because of flowdown provisions of the Service Contract Act of 1965, I asked William Allen, NASA Contracting Office for the EG&G contract, to request the contractor (EG&G) to submit a breakdown of the labor rates to be paid under the subcontracts. Mr. Allen gave me a letter dated February 23, 1983, from EG&G in which EG&G submitted labor rates allegedly paid to ESI under their fixed price subcontract with ESI. These rates are approximately eight to nine percent (8-9%) higher than the June 30, 1981, rates reimbursed ESI under Contract NAS10-9874 and higher than Wage Determination Revision 3 rates (a copy of this letter is attached as Attachment A).

Appendix F

Further Affiant sayeth not.

s/ Philip E. Whitaker, Jr.
PHILIP E. WHITAKER, JR.
Supervisory Contract Specialist,
NASA

Sworn and subscribed to
before me this 7th day
of April, 1983

s/ Joan J. Hunt
Notary Public
NOTARY PUBLIC STATE OF FLORIDA
AT LARGE
MY COMMISSION EXPIRES MARCH 15, 1986

Office - Supreme Court, U.S.
FILED
DEC 24 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-496

In the Supreme Court of the United States

OCTOBER TERM, 1984

EXPEDIENT SERVICES INCORPORATED, ET AL., PETITIONERS

v.

JAMES M. BEGGS, ADMINISTRATOR, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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RICHARD K. WILLARD
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QUESTION PRESENTED

Whether petitioners' claim that the Service Contract Act of 1965 discriminates against non-union employees has become moot because the petitioning employer has ceased doing business as a government contractor and the petitioning employees have joined a union.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-496

EXPEDIENT SERVICES INCORPORATED, ET AL., PETITIONERS

v.

JAMES M. BEGGS, ADMINISTRATOR, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals remanding the case for further proceedings (Pet. App. 19a) is reported at 721 F.2d 1323. The order of the court of appeals dismissing the appeal as moot (Pet. App. 23a) and the opinions of the district court (Pet. App. 1a-18a, 20a-22a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1984, and a petition for rehearing was denied on June 18, 1984 (Pet. App. 24a-25a). On September 8, 1984, Justice Powell extended the time within which to file a petition for a writ of certiorari to and including September 27, 1984 and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2(a) of the Service Contract Act of 1965 (SCA), 41 U.S.C. 351(a), provides:

> Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500, except as provided in section 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees, shall contain the following:
>
> (1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary [of Labor], or his authorized representative, in accordance with prevailing rates for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's length negotiations. In no case shall such wages be lower than the minimum specified in subsection (b) of this section.

Section 4(c) of the SCA, 41 U.S.C. 353(c), provides:

> No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such

service employees would have been entitled if they were employed under the predecessor contract: *Provided*, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.

STATEMENT

1. In 1977, petitioner Expedient Services, Inc. (ESI) received a noncompetitive contract with the National Aeronautics and Space Adminstration (NASA) to perform maintenance work at the Kennedy Space Center (Pet. App. 2a). The contract contained a wage determination by the Department of Labor (Department) pursuant to the Service Contract Act of 1965, 41 U.S.C. 351 *et seq.*, reflecting the wages paid by the previous contractor under its collective bargaining agreement (Pet. App. A4).[1] See Section 4(c) of the SCA, 41 U.S.C. 353(c). ESI's maintenance employees were not unionized (Pet. App. 4a). For this reason, subsequent wage determinations for extensions of the contract were based on the prevailing wage rates in the locality, rather than the actual wages paid ESI's employees (*id.* at 4a-5a). See Section 2(a)(1) and (2) of the SCA, 41 U.S.C. 351(a)(1) and (2).[2]

Following expiration of the term of the contract, as extended by two option years, NASA elected in 1980 to reprocure the contract on a competitive basis. The Department issued a wage determination for the reprocurement

---

[1]The Department's wage determination is the minimum amount that may be paid employees under a service contract. See 41 U.S.C. 351(a)(1), 353(c).

[2]Subsection (a)(1) applies to wages; subsection (a)(2) contains similar provisions with respect to fringe benefits.

reflecting the prevailing wage rates in the locality, which were lower than the rates paid the ESI employees. Under Section 4(c) of the SCA, had ESI's employees been unionized, the wage determination would have been based on their actual wage rates, unless after a hearing the Department determined that those rates were "substantially at variance" with the prevailing rates in the locality. Pet. App. 4a-5a.

2. a. Petitioners — ESI and a class of its maintenance employees — commenced this action in the United States District Court for the Middle District of Florida in January 1981, seeking to enjoin procurement of a new contract based on the Department's wage determination. They alleged that the wage determination for the reprocurement was invalid, contending that Section 4(c), on its face and as applied, deprived both ESI and the employee class of equal protection and the class members of their First Amendment right of association because employees and employers subject to a collective bargaining agreement received more favorable treatment than did those not subject to such an agreement (Pet. App. 6a-7a, 11a-15a).[3] They also challenged the constitutionality of Section 2(a)(1) and (2) on similar grounds. The court entered a temporary restraining order staying completion of the procurement (Pet. App. 6a).

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[3]Petitioners also alleged that the wage determination violated the Administrative Procedure Act in various respects; they later amended their complaint to challenge on contractual and constitutional grounds NASA's refusal to grant the employees a wage increase while the litigation was pending and a temporary restraining order was in effect. The district court rejected on the merits the constitutional and statutory claims of the employee class (Pet. App. 15a-18a), ruled that the contractual claim was within the exclusive jurisdiction of what was then the Court of Claims (*id.* at 17a), and concluded that ESI's challenge to the wage determination was moot (*id.* at 8a-9a). Petitioners did not challenge these holdings in the court of appeals and do not appear to do so before this Court.

When the case was not ready for trial before the TRO was scheduled to expire, the parties stipulated that NASA would not award the contract pending a ruling by the court. During this period, ESI and its employees continued to perform the maintenance work at Kennedy Space Center. Following expiration of the term of the proposed maintenance contract, NASA withdrew the disputed reprocurement in the spring of 1982. It announced at that time that the maintenance contract would be included in a larger base-wide procurement to be awarded in January 1983. Pending that award, NASA offered, and petitioners accepted, the opportunity to continue performing the maintenance work at the Center. ESI was not qualified to bid and did not bid on the base-wide operations contract. Pet. App. 6a.

b. Following a nonjury trial in August 1982, the district court issued its decision on October 1, 1982. The court dismissed the constitutional claim of ESI, ruling that ESI did not have standing because, in view of the fact that it was not qualified to bid on the base-wide contract, it "d[id] not have a personal stake in the outcome of this action" (Pet. App. 9a). The court did find that the employee class had standing to raise its constitutional claims, reasoning that members of the class might be hired by the new contractor and paid less than they would receive had they been unionized under ESI, and that it could fashion a remedy to redress the injury if it found for the class on the merits (*id.* at 10a).[4] On the merits, however, the court ruled that Sections 2(a)(1), (2) and 4(c) of the SCA are constitutional (Pet. App. 11a-15a). It concluded that Section 4(c) allowed members of the class, if they desired, to challenge a wage determination based on a prior union contract where the union wage

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[4]The court did not specify the nature of such a remedy.

rates were significantly different from those prevailing in the locality.[5] Accordingly, union employees would not necessarily receive more favorable treatment than non-union employees. To the extent that challenges to union wage determinations were not being raised, the SCA gave "union employees benefits which they do not deserve," but that did not "entitle [petitioner employees] to have equally improper wage determinations issued to cover their contract" (*id.* at 15a).

3. a. Petitioners appealed solely with respect to the district court's rulings that ESI lacked standing and that the challenged sections of the SCA are constitutional. While the appeal was pending, the base-wide contract was awarded and most of ESI's maintenance employees became employed by the new contractor. They elected to become subject to an existing collective bargaining agreement to which the new contractor was a party. Pet. App. 27a. In light of these developments, respondents filed a "Suggestion of Mootness, or alternatively, Request for Remand." The court of appeals, while retaining jurisdiction, remanded the case to the district court for the limited purpose of "making * * * additional findings surrounding the issue of mootness" (Pet. App. 19a).

b. On remand, the parties engaged in further discovery and submitted a joint stipulation to the district court (Pet. App. 26a-30a). The stipulation established that ESI was no longer a NASA contractor and that "substantially the same employees" who were members of the class were now employed by the base-wide contractor and had "elected" to become members of a union (*id.* at 27a). The district court accepted respondents' arguments that petitioners now lacked standing and that their constitutional claims had

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[5]The district court applied the same analysis to wage determinations for contract extensions under Section 2(a)(1) and (2) (Pet. App. 12a-13a). See S. Rep. 92-1131, 92d Cong., 2d Sess. (1972).

become moot (*id.* at 20a-22a). In an unpublished order, the court of appeals, "[b]ased upon the record on remand," dismissed the appeal as moot (*id.* at 23a).

ARGUMENT

Petitioners do not challenge the district court's ruling on the merits of their claim, nor do they allege that there is a conflict on this question. Indeed, no other court appears to have addressed the issue. The district court plainly was correct in concluding (Pet. App. 11a-15a) that the Service Contract Act does not discriminate against non-union employees because it provides an adequate means of ensuring that wage determinations for unionized employees do not vary substantially from those made for other employees. See Section 4(c), 41 U.S.C. 353(c).

1. The petitioning employees contend (Pet. 11-25) that their challenge to the law is not moot because they are now receiving lower wages and fringe benefits than they would be receiving had they been members of a union when employed by ESI.[6] The finding of mootness by both courts

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[6]Petitioners make an unsupported allegation (Pet. 12 & n.6) that ESI's claim is not moot. This contention is without merit, as the district court held in its initial opinion (Pet. App. 9a). The injury ESI alleged was that it would not be able to compete on the reprocurement because it was paying higher wages than the other bidders would be required to pay under the wage determination. But that reprocurement was withdrawn, and ESI was not eligible to bid on the succeeding one. Hence, ESI did not suffer any injury from the operation of the SCA. It does not now claim to be subject to a realistic possibility of future injury.

Petitioners also allege (Pet. 17-18, 20, 24) that their First Amendment rights have been chilled by the possibility of lower wage determinations in the future. This claim is insubstantial, especially in light of the employees' earlier decision to decertify the union while employed by ESI (see Pet. App. 4a): if they were able voluntarily to vote against union representation then, there is no reason why they cannot do so now. In any event, the district court's factual finding (Pet. App. 22a) that petitioners have now voluntarily chosen union representation disposes of their claim of a chilling effect, which necessarily rests on an assertion that they joined the union involuntarily.

below is fully consistent with this Court's precedents and presents no novel legal issues. Petitioners' factbound claim to the contrary does not merit this Court's review.

Petitioners' reliance on their alleged continuing injury misconceives the basis for the courts' conclusion that their appeal is moot. The district court was willing to assume arguendo (Pet. App. 21a) that the employees were receiving benefits lower than they would be receiving had they been unionized at ESI, but concluded that the case had become moot because it could not now grant relief that would benefit them (*id.* at 22a). Petitioners sought only a prospective determination that the statute is unconstitutional.[7] Even if this could benefit non-union employees (but see page 9, *infra*), it would be of no assistance to petitioners, who are now unionized.[8] A prospective declaration that the statute is unconstitutional simply would not now benefit them: it could increase neither the wage determinations petitioners received in the past as non-union employees of ESI nor those that they are now receiving as union members. Petitioners nowhere address this fundamental point. Their claim has become moot.[9] See, *e.g.*, *Murphy* v. *Hunt*, 455 U.S. 478, 481-482 (1982); *United States Parole Commission* v. *Geraghty*, 445 U.S. 388, 396-397 (1980); *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969).

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[7]Petitioners did not seek damages for past injuries resulting from the allegedly unconstitutional operation of the SCA.

[8]Petitioners represent a class of the former employees of ESI, not of all non-union employees of federal contractors (Pet. App. 1a).

[9]Petitioners' claim obviously is not "capable of repetition, yet evading review." See, *e.g.*, *Dunn* v. *Blumstein*, 405 U.S. 330, 333 n.2 (1972). The union or non-union status of particular employees of government contractors does not change so swiftly as to prevent court review of a challenge by non-union employees. Indeed, petitioners themselves were not unionized for a period of some five years. Nor is this case similar to *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974), where

2. In any event, the economic injury alleged by petitioners — receipt of lower wage determinations because of their non-union status — could not have been redressed by a judicial determination that the challenged portions of the SCA are unconstitutional. The provisions of the SCA that petitioners challenge were added by Congress in 1972. See Pub. L. No. 92-473, § 1(a) and (b), 86 Stat. 789. Prior to that time, all wage determinations were made on the basis of the rates prevailing in the locality. See Pub. L. No. 89-286, § 2(a)(1) and (2), 79 Stat. 1034. If the different treatment accorded unions under the 1972 amendments were determined to be unconstitutional, all wage determinations would be made, as they were before, by reference to the rates in the locality. See *Reitz* v. *Mealey*, 314 U.S. 33, 39 (1941); *Davis* v. *Wallace*, 257 U.S. 478, 485 (1922). This is precisely the treatment that petitioners received as non-union employees. They are receiving no less now. Any relief would merely invalidate an advantage given unionized employees; it would not confer a like advantage on those not unionized. Indeed, the district court recognized as much (Pet. App. 14a). Accordingly, even when petitioners were non-union employees of ESI, their claimed injuries would not have been redressed by a determination that the 1972 amendments to the SCA are unconstitutional.

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the challenged government action was "not contingent" and had, "by its continuing and brooding presence," adversely affected the petitioners (*id.* at 122). Here, by contrast, the challenged action is contingent on, among other things, a failure to apply the Section 4(c) proviso in particular circumstances. See pages 5-6, *supra*. Moreover, the mere existence of the statute has not had a substantial chilling effect on petitioners. See note 6, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 84-496

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EXPEDIENT SERVICES, INCORPORATED and JOHN CURRY, RALH RHINELANDER, and RICHARD FRAZIER on behalf of themselves an all others similarly situated,

Petitioners,

v.

JAMES M. BEGGS, Administrator of the National Aeronautics and Space Administration, and RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor,

Respondents.

PETITIONERS' REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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EDITOR'S NOTE

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I. INTRODUCTION

The respondents in their Brief In Opposition ["Opp. Brief"] have attempted to minimize the importance of the issues presented to the Court in the Petition for Writ of Certiorari. ["Pet."]. The Solictor misstates certain facts, misunderstands the questions presented, and attempts to create the illusion that this case is weighted down with simplistic facts inappropriate for Supreme Court review. This is not, however, the case.

Many of the facts in the underlying cause of action were the subject of a stipulation between the parties. (See Pet. at 26 A-29A). The remainder of the underlying facts had been decided at trial and are not now subject to revision or question by the respondents. The Response, then, is a thinly veiled attempt to sidetrack the Court from the importance resolving of the issues presented.

The government failed to address: 1) whether the coerced acts of some members of a certified class moot the injuries of the entire class; and 2) when are the real injuries of an entire certified class of such diminimus proportions that the claims of the entire class become moot?

The respondents do not rebut any of the legal arguments raised by the petitioners. Instead, they submit that there is no conflict in the circuits on the issues presented. The reason being that the issue of mootness had long ago been decided by this court. (See Pet. at 11-15).

If the government successfully prevents this court's review of the erroneous lower court decisions, then the law of mootness in class actions shall certainly be thrown into turmoil.

II. THE RESPONDENTS' MISCHARACTERIZE AND MISSTATE THE QUESTIONS PRESENTED TO THIS COURT.

Respondents have continually attempted to characterize this action at each juncture of the appellate process as having become moot because some of the petitioner-employees had involuntarily terminated their employment relationship with the petitioner-employer, joined a union, and because the petitioner-employer (ESI) had ceased doing business with the government.

The Solicitor mistakenly characterizes the employee-petitioners injuries as having ceased when they joined a union. (See Opp. Brief at 7 n. 6). This posture displays respondents continuing misunderstanding of the mootness doctrine as well as the facts in this case. Of the petitioner-employees who were subsequently offered employment with EG&G (the successor contractor to ESI) and who admittedly

elected to join a union, they did so only to protect their wages from further erosion because of their non-union status. (See Pet. at 31A-33A).

However, regardless of whether some petitioner-employees joined a union, there still remains to be decided the rights of the class action petitioner-employees who were not offered employment by the successor employer, EG&G, and those other workers who did not join the union. Further, as to those employees who were not employed by EG&G, and those employees who were employed by EG&G and did join a union and still suffered financial injury, all of their claims were not moot.

As has so often been stated, mootness cannot occur so long as there is a live controversy, and any unremedied real injury is sufficient to sustain the controversy. Memphis

Light, Gas, and Water Division v. Croft, 436 U.S. 1, 8-9, (1978); Powell v. McCormack, 395 U.S. 486, 497 (1969); Firefighters Local Union No. 1784 v. Stotts, _____ U.S. _____, 104 S.Ct. 2576, 2584 (1984). Here, the petitioner-employees, both union and non-union, continue to suffer injuries of not only a financial nature, but of a constitutional magnitude as well. (Pet. at 10a).

Regarding the claims of the petitioner-employer the same standards of mootness are applicable. The employer, ESI, still has a grievance outstanding which has never been finally decided. (Pet. at 12, n. 6). It's claims therefore, cannot be said to be moot.

III. THE RESPONDENTS MISUNDERSTAND THE FACTS OF THIS CASE

To resolve the questions presented, one must understand the facts of this case

as they are affected by the law of mootness. The government's failure to understand the facts of this case makes it is impossible for them to argue that this case is moot.

Contrary to the Solicitor's argument (Opp. Brief at 4 n.3), the petitioners challenged each aspect of the district court's first opinion. (Pet at 11-25). Those issues not explicitly appealed were done so implicitly in the appeal of another issue. Specifically, the issue of petitioners seeking the recovery of suspended wage increases travelled with the appeal of the issue of the constitutionality of the Service Contract Act, 41 U.S.C. §351 et. seq. ["Act"], as the two issues were and are inextricably intertwined.

Also contrary to the Solicitor's contention (Opp. Brief at 7 n. 6), the financial injury suffered by ESI remains unabated. The government had ample opportunity at both the trial and

appellate levels to argue that ESI suffered no injuries and that its claims were moot. However, as supported by the record, ESI suffered expenses in excess of $10,000 which were directly attributable to the actions of the respondents in not permitting ESI to bid competitively upon and receive an award of a contract. See Transcript at 95, 105-08.

Another glaring misunderstanding of the facts in question is exemplified by the Solicitor's statement that the employees of ESI chose to decertify their union while employed by ESI. (Opp. Brief at 7 n. 6). The petitioner-employees did not decertify the IAM, rather, the employees of ESI elected not to be represented by a union; the two situations are not the same. See Pls Ex. Nos. 42-44, R. 426-27.

Finally, the government's argument that petitioners sought only prospective relief

(Opp. Brief at 8) is also erroneous. The petitioner's Third Amended Complaint in addition to seeking that certain sections of the Act be declared unconstitutional and other relief, sought to have their wages accurately reflected in the wage determinations that were issued prior to and after the original complaint in this action was filed. See Count VI, Paragraph 46 of Plaintiffs Third Amended Complaint. This request for relief was not merely prospective.

IV. THE QUESTION OF MOOTNESS PRESENTED TYPIFIES THE SERIOUS LEGAL ISSUES REQUIRING RESOLUTION BY THE COURT.

The Solicitor has inadequately addressed the issue of mootness as presented by the petitioners. The Solicitor relies on only two arguments to rebut the Petition for Writ of Certiorari. First, the government argues that the petitioners sought only pro-

spective relief in seeking the Act declared unconstitutional. As noted above, petitioners Third Amended Complaint clearly sought monetary damages relating back to July, 1981. (The Third Amended Complaint was filed in May, 1982. The original complaint was filed on January 31, 1981). Clearly, then, the petitioners herein did not and do not now seek merely prospective relief.

Second, the Solicitor argues that declaring the challenged portions of the SCA unconstitutional would not redress the financial injuries suffered by the petitioners-employees. This argument is at best superfluous, at worst a continuing misunderstanding of the facts at issue.

The petitioner-employees while employed by ESI received wages and fringe benefits higher than paid to their peers employed by other contractors. At that time, the petitioner-employees were protected from a wage and benefit reduction because of the

protection afforded employees of successor non-union employers. Once the government awarded the base wide contract to EG&G, the non-union class action petitioner-employees were no longer protected by the Act. Because of this failure of the Act to protect the wages of non-union employees, the employees were informed by EG&G that the wages and fringe benefits that they would receive would be substantially less than the wages of the other EG&G employees who were unionized. (See Pet. at 31A-33A).

Facing, in many cases, financial ruin, the non-union petitioner-employees "voluntarily" elected to join the union representing other EG&G employees. Once covered by the collective bargaining agreement the class action employees received the same wages as other EG&G employees, but those wages and fringe benefits were less than they were receiving as non-union employees of ESI.

An affirmative ruling on Count VI of the Third Amended Complaint would afford the petitioner-employees the financial relief they sought at trial. Removal of the mootness block in this case would permit on remand a declaration that the discriminatory provisions of the Act are unconstitutional and would free employees to fairly choose whether or not they wanted to be represented by a collective bargaining agent. Such a declaration would lift the coercion implicit in the Act and afford full First Amendment Rights to service contract employees. This would remedy the constitutional intringements alleged by the petitioners in a reviewable decision of the Eleventh Circuit.

V. CONCLUSION

The lower court decision misapplying the

law of mootness must not be allowed to stand. A failure by the Court to review the serious issues presented would create a result totally at odds with the law of mootness as crafted by this court.

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